Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

On Writ of Certiorari to the United States Court of Customs and Patent Appeals

PETITIONER'S OBJECTION TO THE MOTION OF CRAIG CORPORATION, SUPERSCOPE, INC., MARANTZ COMPANY, INC., AKAI AMERICA, LTD., CLARION CORP. OF AMERICA, J.L.L. CORP. OF AMERICA, INC., KENWOOD ELECTRONICS, INC., PIONEER ELECTRONICS OF AMERICA, SANYO ELECTRIC, INC., KRACO ENTERPRISES, INC., ASSOCIATION OF ELECTRONIC IMPORTERS, AND FOREIGN TRADE ASSOCIATION OF SOUTHERN CALIFORNIA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Craig Corporation, Et Al., (hereinafter "applicants") seek leave to file an *amici curiae* brief not in support of either party's position on any of the questions with respect to which this Court has granted certiorari. Rather, the applicants would argue that

the case should be dismissed on the grounds that the underlying statute which petitioner invoked to obtain judicial review, 19 U.S.C. § 1516(d), is unconstitutional.

Petitioner objects to the motion and respectfully urges that it be denied. At no time during the two publicized Court proceedings below did any of the applicants attempt to appear as *amicus* either to argue the alleged constitutional infirmity or any other matter. Further, none of them attempted to intervene.* Had they proceeded as the applicant for intervention had done in *Airco, Inc.* v. *United States*, Cust. Ct. No. 76-3-00643, they could have placed squarely before the Customs Court the very issue they now seek to place before this Court. Instead, the present applicants have chosen to play a waiting game, while the parties and the Courts have made substantial expenditures of time, effort, and resources in dealing with the substantive issues of the litigation; now, at the eleventh hour, applicants ask permission to have this Court consider their argument that all the litigational effort has been for naught. We submit that that request should be denied.

Finally, we cannot help but observe that the applicants' claim of unconstitutionality is on its face so totally lacking in merit that their motion could be denied on that ground alone. Applicants contend that 19 U.S.C. § 1516(d) is unconstitutional because they, as importers, are left out of such proceedings, whereas, they say, 19 U.S.C. § 1516(c) passes constitutional muster because it permits importers to participate. However, had petitioner invoked 19 U.S.C. § 1516(c), there would have been no more than a remote possibility that any of the applicants would have become a party, since the importer/party-in-interest in a 19 U.S.C. § 1516(c) proceeding is, in effect, selected at random (and may not even have any real interest in actively participating in the litigation). *See* 19 U.S.C. § 1516(c) and (f). Had such proceeding been initiated, the applicants probably would have had to wait in the wings while the litigation was being conducted. Indeed, with respect to most every action tried in the Customs Court, there are importers of the same kind of merchandise the subject of the litigation who are not parties in the particular litigation. This is the

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* Applicants cite an unpublished order of the Customs Court, dated December 12, 1977 (entered on December 14, 1977), in *Airco, Inc.* v. *United States*, Customs Court No. 76-3-00643, for the proposition that no intervention is permitted in a 19 U.S.C. § 1516(d) proceeding. This reference is inaccurate and misleading.

In *Airco*, a purported importer/consignee moved to intervene in a 19 U.S.C. § 1516(d) proceeding, claiming that it had a statutory and constitutional right to intervene. Both the American manufacturer/plaintiff and the Government/defendant opposed the motion, arguing that in addition to there being no statutory or constitutional right of intervention, the applicant for intervention had not even demonstrated that it was the importer/consignee which it claimed to be. [Other arguments were also advanced by the parties in opposition to the motion.] While the Customs Court entered an order denying the applicant's motion, no explanation was given for the denial, and contrary to the assertion of the applicants herein, it is not known whether the Customs Court determined that there was no right to intervene in 19 U.S.C. § 1516(d) proceedings.

Subsequently, the applicant in *Airco* filed a motion for rehearing in the Customs Court, (1) rearguing that it is an importer/consignee and (2) developing the argument that to hold that it has no right to intervene would render 19 U.S.C. § 1516(d) unconstitutional. Again, both parties in *Airco* joined issue with the applicant for intervention on all points, and again, on February 28, 1978, the Customs Court entered an order denying the motion without indicating its views on the statutory and constitutional questions raised.

very nature of Customs Court litigation, as this Court has recognized. *United States* v. *Stone & Downer Co.*, 274 U.S. 225 (1927). An "interested" non-party who is displeased with the outcome of Customs Court litigation, is then free, and often elects, to relitigate—to "improve the record" or to reargue the law. *See Stone & Downer.*

WHEREFORE, for the reasons stated, the applicants' motion to file an *amici curiae* brief should be denied.

Respectfully submitted,

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